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C O N F I D E N T I A L SECTION 01 OF 04 THE HAGUE 001806

SIPDIS

E.O. 12958: DECL: 07/15/2013

TAGS: [PREL](#) [KAWC](#) [KJUS](#) [ICTY](#) [KICC](#)

SUBJECT: ICC: A CAUTIOUS BEGINNING WITH MIXED SIGNALS FROM THE PROSECUTOR

REF: 02 THE HAGUE 3524

Classified By: Legal Counselor Clifton M. Johnson per reasons 1.5(b) and (d).

1. (C) Summary: Public documents of the International Criminal Court (ICC) and conversations with diplomats from friendly states parties to the Rome Statute and other members of The Hague international law community have given Embassy legal officers an early glimpse into the formative activities at ICC headquarters. Chief Prosecutor Luis Moreno-Ocampo and his key staffers are working to develop principles, rules and regulations to guide their selection of the first preliminary examinations and investigations while at the same time culling through over 400 submissions alleging potential crimes for the ICC to pursue. Ocampo has signaled his interest in examining potential crimes in Congo and Colombia. Less clear are his views on Iraq. While he has spoken of alleged crimes involving British forces in Iraq in semi-public briefings, his private comments indicate that such cases would be highly unlikely candidates for ICC investigations. Meanwhile, in late June, the ICC ended the phase of leadership head-hunting when ICC judges selected Bruno Cathala of France as the organization's first Registrar. With leadership figures now in place in all three branches of the court, the next key event is Ocampo's press briefing on July 16 where he will provide an overview of "information received by the Office of the Prosecutor regarding potential situations under the jurisdiction of the Court." End summary.

The Prosecutor Promises Restraint and Focus . . .

2. (C) ICC Chief Prosecutor Luis Moreno-Ocampo faces three major tasks at this time -- setting out his office's investigative and prosecutorial policies and principles, organizing the office itself, and reviewing incoming information concerning potential crimes. Ocampo's early thoughts on prosecutorial policy may be found in a draft policy paper OTP published on the ICC website in advance of a June 17-18 OTP "public seminar" (see www.icc-cpi.int/otp/policy.php). OTP seems to be making an effort to cool the passions and lower the expectations of ICC activists who want the prosecutor to issue ambitious indictments soon. Three aspects of the paper in particular give an early view into how Ocampo intends to manage his investigative responsibilities.

3. (C) First, the paper emphasizes the constraints on ICC action much more than the opportunities for investigations and prosecutions. Echoing the new Registrar's views (see paras 11-13 below), it emphasizes "the logistical constraints that will limit the practical scope of action of the Court" and argues for "a project-oriented as opposed to a static organisation model" for the court. Its emphasis on resource constraints is matched by a stated commitment to complementarity -- the principle that national jurisdictions have primacy over the ICC and that the ICC merely complements national systems. It makes a restrained, if rhetorical, claim that the ICC's success should be measured "by the absence of trials by the ICC as a consequence of the effective functioning of national systems." Such rhetoric, we have heard from close observers of the ICC, has strongly irritated leading ICC supporters in the non-governmental organization (NGO) community.

4. (C) With respect to complementarity, OTP takes an initial stab at evaluating the content of the Rome Statute's provision for determining that the ICC may take jurisdiction over a situation if an otherwise responsible state would be "unwilling or unable" to exercise its jurisdiction. It suggests that the prosecutor will need to take a hard look at such situations before proceeding to investigations. The paper emphasizes that "States remain responsible and accountable for investigating and prosecuting crimes committed under their jurisdiction and that national systems are expected to maintain and enforce adherence to international standards." Indeed, the prosecutor seems eager to use his position as much to "help State authorities to fulfill their duty to investigate and prosecute at the national level" as to investigate and prosecute crimes himself.

15. (C) Second, the OTP is clearly heading toward a policy -- similar to that of the International Criminal Tribunal for the former Yugoslavia (ICTY) -- of focusing its investigative and prosecutorial energies on senior-level perpetrators of crimes within its jurisdiction. Here the OTP appears to be taking a narrower approach than the Rome Statute, which refers to "the most serious crimes of concern" to the international community, by focusing on only the most senior alleged perpetrators of such crimes. The OTP argues that "(t)he concept of gravity should not be exclusively attached to the act that constituted the crime but also to the degree of participation in its commission." The OTP policy paper concludes that the OTP should therefore "focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organization allegedly responsible for those crimes." Embassy legal officers have learned from some participants at the June 17-18 OTP seminar that this aspect of the paper caused the greatest consternation among the NGO community, which decried the emergence of a so-called "impunity gap," in which senior levels get prosecuted but lower-level criminals escape prosecution. OTP anticipated that charge by stating, in its paper, that "less grave cases" should be returned to national jurisdictions for prosecution -- again, a further echo of the ICTY and its "completion strategy".

16. (C) Finally, the OTP does not fully suggest how it will evaluate information that NGOs and individuals are increasingly submitting as evidence of war crimes, crimes against humanity or genocide. Embassy contacts have noted that the prosecutor seems obligated to evaluate incoming information, whatever its source, pointing to the provision of Article 15(2) of the Rome Statute that the "Prosecutor shall analyse the seriousness of the information received." The paper emphasizes that OTP's Analysis Section "must be strengthened" so that it can undertake "focused and effective" preliminary examinations of incoming information. The OTP especially wants to develop analytic capabilities to identify "complex patterns of criminal conduct" and the presence of elements of alleged crimes. Again, the paper returns to the theme of resource limitations, noting the OTP's interest in "cost-effective" investigations.

17. (C) A set of "draft regulations" designed to guide OTP's investigative and prosecutorial activities gives some insight into how it will evaluate whether information provides a sufficient basis for an investigation. For instance, the draft section on preliminary examinations would guide the office from the initial collection of communications submitted to the OTP, to its "assessment of the credibility and reliability of the sources of information" and the preparation of a "preliminary examination report" and "draft investigation plan." The ultimate aim in this respect would be a recommendation from the deputy prosecutors for investigations and prosecutions to the chief prosecutor as to whether OTP should seek authorization from a pre-trial chamber to conduct an investigation. A draft investigation plan would assess such items as the reasonableness of belief that a crime within the ICC's jurisdiction took place; the role of likely suspects and aims of an investigation; whether a case would meet the complementarity standards of the Statute; a discussion of required resources for an investigation; and other matters. The full text of the regulations may be found at [www.icc-cip.int/otp/draft regulations](http://www.icc-cip.int/otp/draft%20regulations).

18. (C) At the organizational level, the OTP deputy slots remain to be filled (perhaps by a decision of the Assembly of States Parties in September), though Ocampo has initiated an active hiring program that tracks his focus on policies and investigations rather than prosecutions at this stage. The institution remains small, and OTP is looking to hire mid-level investigators and lawyers to guide preliminary examinations of incoming information as well as lawyers with background in public international criminal law. He has hired as his chief of staff and head of the OTP's "complementarity unit" Argentine diplomat and lawyer Sylvia Fernandez. Fernandez has extensive experience with the ICC, having served as a senior negotiator for Argentina at Rome and as head of the working group looking at the definition of aggression in the ICC Preparatory Commission. A UK colleague indicated that she is considered a reliable and serious person who is rated very highly by FCO lawyers. The experience of some USG delegates to the ICC Rome Conference is less positive and some credit her with the drafting of various anti-U.S. provisions in the statute. We expect that Fernandez' role and influence will become clearer over time.

. . . But Is Ocampo Ready For Prime Time?

19. (C) While Ocampo seems to be moving the OTP in a careful direction with his draft policy paper, his public statements reveal a prosecutor who has not yet mastered his public role. Ocampo will be further tested and subject to public scrutiny

when he describes in a July 16 press conference the over 400 submissions received by the OTP thus far, of which over 100 are said to be Iraq-related. In semi-private forums and in private conversations reported to Embassy legal officers, Ocampo has indicated consistently that his initial investigative interests will focus not on Iraq but on the situation in the Congo, including the potential involvement of Belgians with financial interests in the diamond industry, and Colombia. In public, however, Ocampo has been less restrained. At a recent presentation before a group of ICTY staff and students participating in a Humanity in Action summer course, Ocampo said that he was looking at the actions of British forces in Iraq -- which, according to one Embassy source, led a British ICTY prosecutor nearly to fall off his chair. It was, another participant said, "a complete shocker" and came without any qualifications. Such statements may contain less than meets the eye. Privately, Ocampo has said that he wishes to dispose of Iraq issues (i.e., not investigate them), much in line with what Registrar Cathala is urging (see para 13 below). In addition, some observers of Ocampo believe he has adopted too much of an academic approach -- raising situations such as Iraq not to signal areas he wishes to investigate but to illustrate the limits of the ICC's jurisdiction (i.e., that jurisdiction may extend to UK but not U.S. personnel).

110. (C) Embassy interlocutors have also suggested that Ocampo's public remarks may be directed at fending off a wave of dissatisfaction among the NGO community about his draft policy paper. According to this reasoning, Ocampo wants to bring attention to the complaints he has received so as to prompt governments to conduct their own investigations and thereby provide a basis for removing these cases from ICC review under the complementarity provision. A colleague at the UK Embassy, who was aware of Ocampo's remarks concerning the UK, said London was not particularly concerned because any information about UK war crimes, if assessed reliable, would be the subject of investigation by relevant UK authorities and, ultimately, not be subject to ICC investigation. Some Embassy contacts also suggest that Ocampo's mediocre English skills may give his public remarks a less nuanced and more glib tenor than intended.

A Cautious French Administrator for the ICC

111. (C) On June 24, the ICC's 18 judges selected as Registrar France's Bruno Cathala -- a pragmatist who impressed Embassy legal officers in his former function as deputy registrar of the ICTY. Cathala has been the de facto Registrar since the fall, when the Assembly of States Parties drew him away from the ICTY in order to be the ICC's Director of Common Services, or chief administrator. (Note: His selection disappointed the Dutch Government, which had expected, as is the tradition with many international legal institutions in the Hague, that the position would go to the Dutch candidate. End note.) A lawyer and civil law judge by training, Cathala has long experience in court and organizational management. The Embassy's experience with Cathala as deputy registrar of the ICTY is solidly positive; he was a leading force behind the emergence of the completion strategy and a constant thorn in the sides of ICTY judges and prosecutors, whom he pressed daily to stick to ICTY efficiency and completion strategy benchmarks. He regularly made himself available to Embassy officers to discuss ICTY issues, and in our periodic contact with him since his departure from the ICTY, has emphasized his interest in seeing the ICC develop in a decentralized, flexible, measured, and narrowly focused way. See reftel.

112. (C) Sensitive to the ICC's resource limitations, Cathala believes that the ICC cannot seek to try all war criminals within the court's jurisdiction but needs to focus its efforts on those most responsible for such crimes. It is a vision derived from his experience at the ICTY and leads him to a different place than many of the ICC's strongest supporters. While he will not have influence over the prosecutor's specific investigative decisions, he will be in a position to help steer the ICC in a fiscally responsible direction. An energetic and voluble character, Cathala professes to be a proponent of caution within the ICC, and his control of the purse will undoubtedly influence the OTP and chambers.

113. (C) Cathala (please protect) told an embassy legal officer that he has strongly advised Ocampo to speak very carefully in public and to be extraordinarily sensitive to the way even strictly accurate statements may be perceived. In the face of the media "pushing and pushing" and under the watchful eyes of governments, the "first wrong word," Cathala said, could easily spell disaster for the court. It will be crucial, he said, for the ICC to dispose easily of "silly things like Iraq". "We're not going to run all over the world," said Cathala, who added that he personally wants relations with the USG to be smooth.

Comment

14. (C) Cathala's personal comments to Emboff and Ocampo's early OTP documents seem designed to put the USG at ease and assure us that the court will proceed carefully and not launch controversial investigations. Ocampo's public statements raise concerns less about what he will investigate and prosecute -- as one colleague noted to us, the prosecutor has an obligation not merely to throw away complaints but must at least dispose of them according to some logic -- than about his ability to avoid embroiling the ICC in controversy even in the absence of any investigations. The proof of Ocampo's abilities and intentions, of course, will be found in how he selects and investigates his first targets.

15. (C) Despite the seeming transparency of the OTP, many questions are likely to remain unanswered until the first investigations are announced. For instance, how will the OTP sift through its growing in-box, some submissions no doubt legitimate but many more politically motivated and useless for the purpose of investigations? How in practice will the prosecutor determine when a State is "unwilling or unable" to exercise jurisdiction over an alleged crime? Will the prosecutor undertake preliminary investigations even before determining whether a State is "unable or unwilling" to do so itself? What specific crimes will be of the most interest to the OTP, and how high up the chain of command will the prosecutor select his investigative targets? With Ocampo beginning to sift through investigation submissions and new staff coming on board, the coming months should demonstrate more clearly whether the ICC and its leadership have the temperament to pursue and sustain a cautious course.

SOBEL